Supreme Court, U.S.
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No. 94-1918

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TEXANS UNITED EDUCATION FUND,
Petitioner,

v.

TEXACO INC. and TEXACO CHEMICAL CO.,
Respondents.

Petition for a Writ of Certiorari
To The Supreme Court of Texas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does Texas Rule of Civil Procedure Rule 76a of Texas confer a constitutionally protected right upon a third party to demand an evidentiary hearing to inspect all documents exchanged during discovery in private litigation when the trial court has lost plenary jurisdiction, and when those documents do not relate to matters affecting the health or safety of the general public?

2. Whether a settlement agreement entered into between private litigants requiring the return of documents produced by one party during discovery "unless required by law" constitutes a "sealing order" that can be used by a third party non-litigant to invoke Texas Rule of Civil Procedure 76a continuing jurisdiction provision.

3. Whether an untimely motion to recuse the entire Texas Supreme Court may be used to perfect an appeal on constitutional grounds to this Court when (a) the Petitioner was aware of the alleged interest purportedly justifying recusal from the inception of the case, and (b) the Court ruled only on issues presented in Petitioner's Application for Writ of Error.

LIST OF PARTIES

Respondent Sexton certifies that the following is a complete list of the parties, in order that members of this Court may determine disqualification or recusal:

1. Petitioners/Intervenors:

   Texans United Education Fund
   Valorie W. Davenport

2. Counsel for Petitioners:

   Ms. Valorie W. Davenport
   Law Office of Valorie W. Davenport
   1100 Louisiana, Suite 4450
   Houston, Texas 77002

3. Texaco Respondents (Defendants and Real Parties in Interest in Mandamus Proceedings):

   Texaco, Inc. and
   Texaco Chemical Co.

4. Defendants/Real Parties in Interest who have not appeared in Intervention Proceeding:

   Louis Garbrecht, Jr.
   W. B. Reals

5. Counsel for Texaco Respondents, Garbrecht and Reals: [1]

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Sugar Land, Texas 77478

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Houston, Texas 77002

Ms. Phyllis G. Schrader
Weycer, Kaplan, Pulaski & Zuber P.C.
1400 Summit Tower
Eleven Greenway Plaza
Houston, Texas 77046-1198

6. Respondent (Original Party Plaintiff and Relator in the Mandamus Proceeding):

John R. Sexton

7. Counsel for Respondent Sexton:

Ms. Joan M. Lucci Bain *
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Houston, Texas 77279

* Application for Admission Pending

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[1] In its Brief in Opposition, Texaco, Inc. and Texas Chemical Company identify wholly owned affiliates, parent, and/or subsidiaries of those respondents.

8. Presiding Trial Court Judge (Respondent in Mandamus Proceeding):

The Honorable Eugene Chambers
Judge of the 215th District Court
1019 Congress, 16th Floor
Houston, Texas 77002

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OCTOBER TERM, 1994

TEXANS UNITED EDUCATION FUND,
Petitioner,

v.

TEXACO INC. and TEXACO CHEMICAL CO.,
Respondents.

Petition for a Writ of Certiorari
To The Supreme Court of Texas

BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Respondent John R. Sexton respectfully suggests that Petitioner has improperly invoked this Court's jurisdiction. Petitioner asks this Court to review the final decision of the Supreme Court of Texas denying Petitioner's Application for Writ of Error to the Fourteenth Court of Appeals, which affirmed the trial court's decision that Texas Rule of Civil Procedure Rule 76a had not been properly invoked, and that it lacked jurisdiction over this controversy. It was not until after the Texas Supreme Court rendered its decision that Petitioner asserted that any federally protected constitutional right had been infringed. Therefore, although Respondent Sexton believes no federally protected interest has been impaired, Respondent agrees that Petitioner has failed to properly preserve any such contention for this Court's review. (See Respondent Texaco's Brief in Opposition, pp. 6-7).

STATEMENT OF THE CASE

Respondent Sexton takes issue with the statement of the case presented by Petitioner in the following respects:

1. There was no Texas court ruling "permitting the agreed, secret removal of court records having a potentially devastating impact on the public health, safety and welfare, without public notice and hearing." (Petition for Writ of Certiorari, pp. i, 14, 16-18).

2. No sealing order has been entered or approved by any Texas court. No sealing order has been requested by Sexton or Texaco arising out of Sexton's underlying lawsuit against Texaco and Texaco Chemical Co.

3. The statement of the case presented in Petitioner's Petition for a Writ of Certiorari fails to properly identify what documents Sexton agreed to return to Texaco and/or keep confidential. Sexton *did not agree* to return any of the pleadings, depositions or exhibits to depositions completed in the development and prosecution of his case nor did he agree to support a motion to seal the Court's records. Sexton also did not agree to return any of the documents Sexton had in his possession at the time of his termination which he produced to Texaco during the course of this litigation. The agreement on its face only applies to documents produced by Texaco. Sexton also did not agree to return or keep confidential the 21 documents which were submitted for *in camera* review since he never had possession of them.

4. The settlement agreement does not require the return or confidentiality of documents that are required by law to be open to the general public. To the contrary, the settlement agreement provides as follows:

> (a) Sexton will return to Texaco all documents and copies thereof produced *by Texaco* in this case. Sexton will keep confidential the information contained in the documents produced by Texaco, unless ordered by a court of competent jurisdiction to disclose these matters *or unless disclosure is otherwise required by legal process or law.*

Thus, contrary to Petitioner's representation that the settlement agreement "required Sexton to keep all information confidential as well as to return all records" (Petition for Writ of Certiorari, p. 7), the agreement only required return of records produced by Texaco and confidentiality of documents not otherwise required by law to be disclosed.

5. The trial court conducted an oral hearing on Petitioner's motions. At the time the trial court dismissed Petitioner's Petition in Intervention, it had before it the Affidavit of Sexton's lead counsel, Bain, which verified that no documents which would have a probable adverse effect upon the health or safety of the general public were subject to the settlement agreement's confidentiality provision. (Appendix B)

6. All documents concerning the risks which existed at the Austin Research Laboratory at the time of Sexton's discharge by Texaco (November 13, 1987), which Sexton had or was able to obtain during discovery in his case against Texaco, have been and continue to be on file with the trial court -- *unsealed*. These documents are accompanied by the affidavits of both Sexton and an independent expert interpreting the significance of those records. There are no documents concerning the conditions that existed at the Austin Research Laboratory, or any other Texaco Chemical Co. facility, that are not in summary judgment evidence or attached to the depositions. Therefore, these documents are no longer "unfiled discovery". They are open to the general public as part of the Court's record.

7. Petitioner's entire justification for its Motion to Recuse the Texas Supreme Court is based upon its allegation that hazardous conditions existed at the Austin Research Laboratory which is within the work and living area of the Texas Supreme Court Justices. (Petition for Writ of Certiorari, p. 10, "As to the Austin Research Laboratory, this area included the building housing the Texas Supreme Court. . ." and p. 17, "In this instance; however, it is what they *don't know* that *will or may* hurt them. The press and members of the Austin populace were denied knowledge of the allegation . . . as well as denied access to the documentation which supported the allegations made by John Sexton".) This appeal does not concern the risk analysis at the Austin

Research Laboratory. Copies of several different drafts of the risk analysis on the Austin Research Laboratory are included in the summary judgment evidence which was filed with the trial court. These documents are also attached to several deposition excerpts filed with the Court as part of that evidence. *There are no documents concerning the conditions that existed at the Austin Research Laboratory which have been sealed.* (Appendix B). Contrary to Petitioner's accusation that Sexton has agreed to conceal the contents of those documents, Sexton is the person responsible for making that information available to the public and, in order to do so, he sacrificed a 30-year exemplary career.

8. Sexton's case against Texaco continued for nearly three years in a bitter and unyielding discovery battle. Before it was settled, and in response to at least three motions for summary judgment filed by Texaco, Sexton accumulated in five volumes the documents reflecting the safety hazards and violations at the Texaco Chemical facilities which had been accumulated from any source during the course of the discovery process. These volumes were filed with the Court, where they remain as part of that Court's permanent record. Because the trial judge limited discovery to the period between November 13, 1985, and November 13, 1987, Sexton never obtained documents concerning current conditions at any of the four Texaco Chemical Co. facilities that were at issue in the case. The specific documents which were requested,

obtained by Sexton or refused by the trial court during the course of Sexton's case against Texaco are identified with particularity and with citations to the records in pages 5-12 of Sexton's Corrected Brief to the Fourteenth Court of Appeals in this case. Those pages are copied verbatim as Appendix A to this Brief.

SUMMARY OF ARGUMENT

Rule 76a is not applicable to this case because no documents have been sealed which meet the definition of "court record" under that rule. Because there are no sealed documents which meet the definition of "court record" or which affect any federally protected interest of Petitioner, no federal constitutional issue is presented.

Petitioner has not been denied access to the Court, equal protection or free speech. Petitioner does not have an unbridled right to all unfiled discovery in any court proceeding in the State of Texas. Rule 76a limits its application to documents outside of the Court's records only when there is a showing that documents (1) are sealed, and (2) involve issues that safety of the general public. This case simply does not involve those documents; therefore, the trial court and appellate court properly found that Rule 76a was not implicated under Texas law.

Petitioner and Davenport have relied on the Sexton affidavits (which are on file with the trial court, unsealed) concerning the conditions that existed at the Austin Research Laboratory at the time he was terminated by Texaco in November 1987 to invoke Rule 76a. Thus, they had knowledge of the alleged "interest" of the Texas Supreme Court Justices at the time their Application for Writ of Error

was filed. Petitioner's assertion that the Supreme Court's denial of writ somehow justifies its untimely filing of a Motion to Recuse is simply without merit.

Petitioner invoked the jurisdiction of the Texas Supreme Court to rule on the merits concerning the trial court and Court of Appeals' interpretation and application of Rule 76a, and the Courts' conclusion that they did not have jurisdiction over the Plea in Intervention filed by Petitioner and Davenport after the trial court's plenary jurisdiction had expired. These are issues of Texas law over which the Texas Supreme Court had proper jurisdiction. By denying Petitioner's Application for Writ of Error, the Texas Supreme Court found that the trial court's action and the opinion of the Fourteenth Court of Appeals, for the most part, correctly interpreted and applied Texas law. The Texas Supreme Court properly exercised its appellate jurisdiction over a ruling of the Fourteenth Court of Appeals interpreting state law jurisdiction which Petitioner invoked.

REASONS FOR DENYING THE WRIT

I. Because no documents or information concerning matters that "have a probable adverse effect upon the general public health or safety" have been sealed, Petitioner has no legally protected interest under federal or state law which entitles it to intervene in Sexton's lawsuit against Texaco.

In response to Petitioner's Plea in Intervention, Sexton filed with the trial court the Bain affidavit and letter to the First Court of Appeals verifying that any documents produced by Texaco pertaining to public health and safety were no longer unfiled discovery. (Appendix B). Neither Petitioner nor Davenport, who had formerly represented Sexton, presented the trial court with any evidence that

documents concerning the public health and safety were being returned or kept confidential.[2]

The settlement agreement presented to the trial court by Petitioner allowed disclosure of any information required by law to be disclosed. Under Rule 76a, any documents pertaining to matters that have a probable adverse effect upon the general public's health and safety are required by law to be disclosed on proper request. Sexton's lead counsel has never received a request from Petitioner to inspect any safety related discovery from this case. The only request by Davenport, Petitioner's Co-Plaintiff in intervention, are those attached hereto as Appendix C, seeking Sexton's medical records, not safety related material. Thus, even if there were safety related materials that had not been filed with the trial court, which there are not, the settlement agreement does not violate Rule 76a.

Although at one time Petitioner's counsel asserted that Rule 76a entitled her to inspect all unfiled discovery, including Sexton's medical records (see Appendix C), Petitioner has not and can not identify any federally protected right or interest that would entitle it to the relief sought without a showing that safety documents have been sealed. Throughout this proceeding, it has been Petitioner and its counsel's position that because safety related material was filed with the Court, there must be some that was not filed. Contrary to Petitioner's representation, Sexton's agreement to return Texaco documents did not "necessarily include

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[2] At oral argument before the Fourteenth Court of Appeals, Petitioner's counsel was asked what type of evidence the Court was required to hear, in her opinion, in order to comply with Rule 76a. Davenport responded that the Court would be required to receive testimony from Sexton's lead counsel that no safety related documents were being returned. Such testimony is included in the Bain affidavit. (Appendix B).

safety related unfiled discovery". (Petition, p. 14). The evidence is to the contrary.[3]

Petitioner's repeated representations to the Texas Court of Appeals, the Texas Supreme Court, and now this Court that the documents being returned by Sexton to Texaco contain information regarding the Austin Research Laboratory are grossly misleading and patently false. Davenport is or at the very least ought to be aware that all documents pertaining to the Austin Research Laboratory, and the conditions described in Sexton's affidavits, with the possible exception of the *in camera* documents which Sexton never received, have already been filed with the trial court. Without a Rule 76a "court record", the trial court simply had no jurisdiction to hear Petitioner's Plea. In the words of the Fourteenth Court of Appeals:

> In its dismissal of Intervenor's Plea in Intervention, the trial court found that no sealing order had been requested or entered in this case. After reviewing the entire record, there is no evidence that anything more than a Protective Order was executed by the trial court concerning the 21 safety documents. There is no evidence of a showing by

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[3] The documents which are contemplated by the settlement agreement include personnel files of Sexton and other Texaco employees, Texaco policy manuals, contractual agreements between Texaco and Sexton, Texaco business plans, Texaco's safety newsletters, documents relating to a dispute between Sexton and another employee at Texaco, annual reports, minutes of various meetings, memos concerning Sexton's performance, management guidelines, disciplinary action taken against various employees, and documents relevant to Sexton's claim of age discrimination. Disclosure of many of these documents would infringe upon the privacy rights of third parties who did not participate in this proceeding.

> Appellants to the trial court that the 21 documents constituted "court records". . . .[4]
>
> . . . Because of our holding . . . that Rule 76a was not implicated in the present case, the continuing jurisdiction paragraph contained within that rule is likewise inapplicable.

(Opinion of the Fourteenth Court of Appeals, Petitioner's Appendix B, pp. 4-5).

In *Ford Motor Co. v. Benson*, 846 S.W.2d 487, 491 (Tex. App. - Houston [14th Dist.] 1993, no writ), the Fourteenth Court of Appeals held that where no sealing order is requested by a party seeking a protective order, it is the non-movant's burden to establish that Rule 76a is implicated by establishing that some or all of the documents are court records. It is Respondent Sexton's position that because neither Sexton nor Texaco sought a sealing order, it was Petitioner's burden to establish that some documents that meet the definition of "court records" under Rule 76a had been sealed in order to invoke the continuing jurisdiction provisions of that rule. Petitioner failed to do so. The trial court's determination as to whether unfiled discovery meets the definition of "court records" under Rule 76a is a determination that is subject to review under the abuse of discretion standard. *Dunshie v. General Motors Corp.*, 822 S.W.2d 345 (Tex. App. - Beaumont 1992, no writ).

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[4] It is Sexton's position that the 21 safety documents subject to the protective order do relate to safety issues; however, Rule 76a appears to exempt those documents because they were only produced *in camera*. Sexton never received a copy of those documents.

II. The Texas Supreme Court did not find that the trial court had jurisdiction over the intervention. To the contrary, the Texas Supreme Court's denial of Petitioner's Application for Writ of Error with the notation "Writ Denied" indicates its ruling that the Fourteenth Court of Appeals properly found no jurisdiction.

Petitioner incorrectly attributes a finding of jurisdiction to the Texas Supreme Court's disposition of its Application for Writ of Error with the notation "Writ Denied". That notation signifies the Texas Supreme Court's approval of the Fourteenth Court of Appeals' interpretation of the law. Texas Rule of Appellate Procedure, Rule 133, which provides:

> In all cases where the Supreme Court is not satisfied that the Court of Appeals in all respects that correctly declared the law but is of the opinion that the application presents no error which requires reversal, or which is of such importance to the jurisprudence of the state so as to require correction, the Court will deny the application with the notation 'Writ Denied'.

The Texas Supreme Court is a court of limited jurisdiction. Texas Government Code, Section 22.001. In its application for Writ of Error to the Texas Supreme Court, Petitioner invoked that Court's jurisdiction pursuant to Texas Government Code Annotated, Sections 22.001(a)(2), (3) and (6). (Vernon 1988). Those sections provide in pertinent part:

Section 22.001. Jurisdiction.

(a) The Supreme Court has appellate jurisdiction, except in criminal law matters, co-extensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

> (2) A case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the Supreme Court on a question of law material to a decision of the case;
>
> (3) A case involving the construction or validity of a statute necessary to a determination of the case;
>
> (6) Any other case in which it appears that an error of law has been committed by the Court of Appeals and that error is of such importance to the jurisprudence of the state that, in the opinion of the Supreme Court, it requires correction, but excluding those cases in which the jurisdiction of the Court of Appeals is made final by statute.

The Texas Supreme Court had jurisdiction to review the holding of the Fourteenth Court of Appeals that the trial court was without jurisdiction. A notation of "Writ Dismissed W.O.J." or "Dismissed for Want of Jurisdiction" would have indicated that there was a defect in the Supreme Court's jurisdiction to hear the matter. Texas Rule of Appellate Procedure, Rule 133. The Texas Supreme Court had jurisdiction to review the Fourteenth Court of Appeals conclusions of law and did so. Furthermore, it had jurisdiction to review Petitioner's contention that the opinion of the Fourteenth Court of Appeals conflicted with other cases interpreting Rule 76a. By denying the writ with the notation "Writ Denied", the Texas Supreme Court merely declared its determination that the opinion of the Court of Appeals, while not correct in all respects, did not contain any legal errors sufficient to require reversal or of sufficient judicial significance to require correction.

Finally, if Petitioner had timely raised an argument that the construction placed by the Fourteenth Court of Appeals upon Rule 76a put that law in conflict with the Constitution of the United States, the Texas Supreme Court had jurisdiction to consider it. *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S.W. 791 (1909) (holding "Where the construction placed by the Court of Civil Appeals upon a law puts that law in conflict with the Constitution of the United States, the validity of the law is involved, and an appeal will lie to the Supreme Court.") In this respect, Respondent Sexton agrees with the argument and authorities submitted by Respondent Texaco and Texaco Chemical Co. on pages 6-8 of their Brief in Opposition to the Petition for Writ of Certiorari, that Petitioner failed to timely assert the constitutional claims it now asks this Court to consider.

CONCLUSION

The Texas Supreme Court properly approved the Fourteenth Court of Appeals' holding that Rule 76a was not implicated in this case and therefore the continuing jurisdiction provision of Rule 76a could not provide the trial court or the court of appeals with continuing jurisdiction over the controversy. That ruling, as reflected by the Supreme Court's denial of Petitioner's Application for Writ of Error, is an interpretation of state law by the state's final authority. Petitioner failed to preserve any federal constitutional issues regarding the interpretation of Texas Rule of Civil Procedure, Rule 76a, in order to properly invoke this Court's jurisdiction. But more importantly, there has been no violation of Petitioner's constitutionally protected rights or interests since no information or documents that pertain to matters which have a probable adverse effect upon the health or safety of the general public have been removed from the public domain, destroyed, or otherwise sealed. All such records remain open to Petitioner as part of the trial court's record in this proceeding. Based upon the foregoing, Respondent Sexton requests that this Court deny the Petition for Writ of Certiorari filed by Texas United Education Fund. Respondent Sexton requests all other relief to which this Court deems him justly entitled.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT,
JOHN R. SEXTON

APPENDIX A

IN THE COURT OF APPEALS
FOR THE STATE OF TEXAS
FOURTEENTH SUPREME JUDICIAL DISTRICT

NO. 14-92-01201-CV
Trial Court No. 89-06630

TEXANS UNITED EDUCATION FUND
and VALORIE W. DAVENPORT,
Appellees

v.

TEXACO, INC. and TEXACO CHEMICAL CO.,
Appellees

and

JOHN R. SEXTON,
Appellee

CORRECTED BRIEF FOR APPELLEE SEXTON

ORAL
ARGUMENT
REQUESTED

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STATEMENT OF FACTS

In order to understand the facts pertinent to this appeal, it is necessary to have an accurate understanding of Sexton's case and the historical development of document production in the underlying cause.

At the time of his discharge, Sexton had been head of the Corporate Safety Department at Texaco, Inc. for nearly a decade. In that capacity he was ultimately responsible for the safety function at Texaco facilities worldwide. In late 1984 and early 1985, under Sexton's direction, Corporate Safety began implementing a hazard assessment program company-wide. (lst Supp. Tr. Pp. 8-9). Sexton has always maintained that he was terminated because hazard assessment reviews conducted by him at four Texaco Chemical Company facilities revealed various unsafe conditions, some of which posed a serious risk of catastrophic incident, and Sexton insisted repeatedly that Texaco Chemical take further action to better evaluate the risks and remedial action to minimize those risks. (1st Supp. Tr., Pp. 16-23). The risk analysis program concentrated on Texaco Chemical Company facilities. The risk analysis program was an attempt by Sexton to determine whether any conditions existed that posed a serious risk to either Texaco workers or the public at large, and whether any violations of applicable safety and environmental laws existed at the facilities. The first stage of the hazard assessment was company-wide. Each facility was asked to do an internal review of specific items identified by Corporate Safety. These internal preliminary inspections were referred to as Potential Accident Liability Evaluations or "P.A.L.E." reports. The P.A.L.E. reports were forwarded from teams conducting the initial inspection to Sexton who reviewed the and forwarded them to Texaco's corporate and outside counsel with recommendations for any necessary remedial action. These reports and

recommendations were eventually returned to Sexton, who then distributed them to the applicable facility. (Petition for Writ of Mandamus, Attachment I, Exhibits "A" and "B").

The P.A.L.E. reports are not the subject of the settlement agreement between Sexton and Defendants. Although requested, Sexton was never able to obtain copies of those reports in the discovery in this cause, because they were completed before November 1985. Some of the P.A.L.E. reports are included on the Defendants' Privileged Document Inventory. These are the documents, together with Sexton's correspondence to and from Texaco's counsel, which Texaco refused to produce, and were submitted to the Court for in camera inspection. Neither Sexton nor his counsel has agreed to return or keep confidential the contents of any of the P.A.L.E. reports, as he never obtained them from Texaco.

After the results of the P.A.L.E. reports were reviewed, Sexton initiated a more detailed hazard assessment at select Texaco Chemical facilities where potential problems had been identified. These "hazard assessments" were conducted by a team which included representatives from Corporate Safety, Texaco Chemical, and the facility itself, and provided a more detailed analysis of the conditions existing at the subject facilities. Hazard assessments were conducted at four Texaco Chemical facilities.[1] The hazard assessments revealed serious safety deficiencies, including

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[1] Sexton was also not able to obtain the hazard assessment reports from all four facilities during discovery because they were conducted in early 1985, and the trial court limited discovery to the period from November 13, 1985 through November 13, 1987. Although the trial court's record does contain some documents from the hazard assessments, these were documents Sexton had maintained, and were produced to; not by, Texaco. They, too, are exempt from the Settlement Agreement which only required return of documents produced by Texaco.

many statutory violations at one Texaco Chemical Company facility, the Austin Research Laboratory.[2] (Petition for Writ of Mandamus, Attachment I, 1st Supp. Tr. Pp. 8-23). To compound the problem, that facility stored and used several extremely volatile and toxic chemicals. As a result, Sexton began pushing Texaco Chemical to conduct an extremely detailed review of conditions at that facility with the objective of determining the potential risk of accidental chemical releases, and the seriousness that such a release would have on the general public. This detailed review was referred to as "risk analysis:. Because the chemicals stored and utilized at that facility were highly volatile, toxic, and in close proximity to a highly populated area, and based upon his own analysis of the seriousness of the violation at issue, Sexton determined that conditions at that laboratory posed a serious risk of injury or death to thousands of people in the Austin, Texas area. (1st Supp. Tr. Pp. 8-29).. It took Sexton over a year to convince Texaco Chemical to proceed with the risk analysis, which included "vapor release modeling' to determine the degree of toxicity in the event of an accidental release.

This appeal does not concern the risk analysis at the Austin Research Laboratory. Copies of several different drafts of the risk analysis report are included in the summary judgment evidence filed with the trial court and are attached to depositions. Furthermore, the documents which have been filed with the Court in connection with Sexton's responses to

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[2] Texaco has continued to deny the existence of any safety hazards; however, Defendants' expert, Herb Miller (who was also Sexton's replacement), admitted in testimony and during his deposition that he was unqualified to render any opinion on violations of safety regulations. Sexton, who is imminently qualified, offered his own affidavit testimony, and the affidavit of an independent expert to interpret the results of the risk analysis at the Austin Research Laboratory. (1st Supp. Tr. 8-23, 2nd Supp. Tr. 6).

Texaco's numerous motions for summary judgment, are accompanied by the affidavits of both Sexton and another expert interpreting the significance of those reports. The results of the vapor release modeling are also included in that evidence. There are no documents concerning the conditions that existed at the Austin Research Laboratory that are not in summary judgment evidence or attached to depositions. Despite Appellants' accusation that Sexton has agreed to conceal the contents of those documents, Sexton is the person responsible for making that information available to the public.

For nearly three years Sexton pursued his claims against Texaco in what was a bitter and unyielding discovery battle. The Defendants engaged in numerous abusive and dilatory tactics without retribution from the trial court, despite Sexton's repeated motions to compel and request for sanction. (See, generally, Attachments E, G, H, K, and N to Sexton's Petition for Writ of Mandamus).[3] Davenport was retained in early 1990 to perform services in connection with the underlying cause; however, Sexton's lead counsel throughout the proceeding was Bain of Nelkin & Nelkin. P.C.

Sexton produced to Texaco numerous documents he had in his possession reflecting the dispute he had with Texaco Chemical over conditions at Texaco Chemical facilities, and his insistence on compliance with safety and environmental regulation. These documents are identified in the record by the initials JRS preceding the numerical

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[3] All references to Plaintiff's Petition for Writ of Mandamus are to the Petition for Writ of Mandamus filed by John R. Sexton on January 22, 1992, in Cause No. 01-92-00020-CV, which record has been included in the record for purposes of appeal pursuant to this Court's Order dated December 3, 1992.

designation. (see, e.g., Petition for Writ of Mandamus, Attachment I, Exhibit "A"). These documents are also excluded from the settlement agreement, as Sexton agreed only to return documents produced by Texaco.

Texaco filed the first of three motions for summary judgment in this case in October, 1989, before Davenport was involved in the case.[4] Thus, all of the representations made by Appellants on page 4 of their Brief concerning what took place at the hearing on that summary judgment are not only inaccurate but pure speculation since Davenport was not in attendance at the hearing.[5] Furthermore, neither the First Motion for Summary Judgment nor the Motion for Rehearing on that motion have any bearing on this case since Plaintiff was forced to respond without the benefit of any discovery from Texaco.[6] (Although Sexton had a Motion to Compel Discovery on file at the time, Judge Chambers did not rule on it for over a year.) At the hearing on that motion to compel conducted February 20, 1981, Judge Chambers

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[4] Contrary to Appellants' representation in their brief, that motion did not address Sexton's claim for wrongful discharge under Sabine Pilot, as Sexton at that time had not alleged a cause of action under Sabine pilot, and was relying on a contractual claim. In responding to that motion, Sexton's response briefly addressed a Sabine pilot claim as an alternative to the contractual claim.

[5] Appellants' General Statement of Facts implies that after Davenport was retained, she somehow facilitated or controlled the course of these discovery disputes and amendments to pleadings. While Davenport did appear at hearing, and while there were vigorous arguments, Davenport actually prepared only two pleadings. She also assisted in the preparation of the Petition for Writ of Mandamus.

[6] Although Sexton served each of the four Defendants with a Request for Production of Documents shortly after this suit was filed, he was unable to obtain any responsive documents from Texaco until May of 1991. (See, Petition for Writ of Mandamus, Pp. 6-7).

agreed to enter the April 12, 1991 Order regarding the mutual use and disclosure of documents which Appellants now contend constitutes the first sealing order. Judge Chambers also limited discovery to the period between November 13, 1985 and November 13, 1987.[7] This and a subsequent order finding the 21 documents which included P.A.L.E. reports to be privileged, were the subject of the Petition for Writ of Mandamus filed by Sexton in January of 1992. (Petition for Writ of Mandamus, Attachments C and D).

Despite her current denial, Davenport was present at the February 20, 1991 hearing when Judge Chambers ordered the parties to enter into a Protective Order regarding confidentiality. (February 20, 1991, S.O.F. p.2)[8] The interim Confidentiality Order was discussed openly in her presence at that hearing:

> Ms. Bain: The Plaintiffs [sic] have offered to enter into confidentiality agreements so that it's clear that is not the problem with the production . . .
>
> . . . . . .
>
> Mr. Clover: I take it that counsel's offer of confidentiality agreement, I would like to have it actually court ordered.

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[7] Sexton was terminated on November 13, 1987, and Judge Chambers ruled that discovery would be limited to a period of two years prior to his discharge. Judge Chambers denied discovery as to anything subsequent to Sexton's discharge.

[8] The February 20, 1991 Statement of Facts is part of the Record transferred to this Court from the First Court of Appeals.

The Court: Not to used for anything other than this lawsuit.

(February 20, 1991 S.O.S., Pp. 173, 187-188). In addition, when Bain was circulating the proposed order to be entered, Davenport was copied.[9]

Finally, on May 3, 1991, Sexton received some documents responsive to his Request for Production.[10] Thereafter, Sexton began deposing various parties and witnesses. Over the course of several months, Bain deposed several employees at Texaco, including the two individual Defendants, and Texaco's designated expert, Herb Miller. The documents produced by Texaco relating to safety issues at the various Texaco facilities were attached as exhibits and discussed thoroughly with the deponents. In the meantime, Texaco filed two more motions for summary judgment and set them for hearing. Sexton filed motions for continuance on each of those summary judgment hearings and finally was successful in obtaining a ruling from the Court that the depositions be completed before entertaining the Defendants' motions for summary judgment. (Petition for Writ of

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[9] See March 1, 1991 letter to Glen E. Clover, Appendix A., p. 2).

[10] These documents are identifiable by their Bates stamps numbers MX00536-MX07355. (2 Supp. Tr. 18). These are the only documents Texaco produced other than documents produced on September 1, 1989. On that date Texaco produced (1) Sexton's personnel file; (2) blank performance appraisal forms; (3) Texaco procedures for completing performance appraisals; (4) Texaco's procedures for disciplinary action; and (5) early retirement and separation packages. (Petition for Writ of Mandamus, p. 6, n.3; Attachment E, p. 7).

Mandamus, Pp. 8-9).[11] After completing the depositions, Bain accumulated the additional evidence obtained through discovery from the Defendants in support of Sexton's claims, including the documents produced by Defendants on May 3, 1991. These were submitted to the Court in five volumes which included affidavits with exhibits and excerpts from the depositions. A Supplemental Statement of Facts was also submitted to the Court which was annotated to the record. These volumes contain documents reflecting conditions of the Texaco Chemical Company facilities. These documents produced by Defendants, later filed with the Court, or used in depositions, are no longer "unfilled discovery' under Rule 76a.

On January 22, 1992, Sexton's Petition for Writ of Mandamus was filed with the First Court of Appeals in Cause No. 01-92-00028-CV styled John R. Sexton v. The

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[11] During the period that Bain was attempting both to schedule and complete the depositions and to obtain the 21 documents withheld by Defendants through Plaintiff's Second Motion to Compel (Petition for Writ of Mandamus, Attachments "H' and "N'), Defendants filed the Second Motion for Summary Judgment seeking to dismiss Plaintiff's claims under Sabine Pilot, Winters, and the Texas Hazard Communication Act. On September 20, 1991, the Defendants filed a Third Motion for Summary Judgment addressing Plaintiff's claims for age discrimination. On October 11, 1991, the trial court heard arguments on Plaintiff's Second Motion to Compel, and Defendants' Motion for Protective Order. The hearing was resumed on November 1, 1991, at which time Judge Chambers denied Plaintiff's Second Motion to Compel Production of the 21 withheld documents (primarily P.A.L.E. reports), granted Texaco's Motion for Protective Order, and Texaco's Second Motion for Partial Summary Judgment. However, Judge Chambers did not sign the order denying Plaintiff's Second Motion to Compel Production of Documents (and granting Defendants' Motion for Protection) until January 15, 1992. Defendant's Third Motion for Summary Judgment, addressing Plaintiff's final cause of action, was set for hearing on January 24, 1992. (Petition for Writ of Mandamus, Pp. 8-9, and attachments referenced therein).

Honorable Eugene Chambers. [12] The case had been set several months earlier for court ordered mediation on January 27, 1992. Sexton reached an agreement at the mediation to settle all of his claims against Texaco. Davenport, however, left the mediation after a disagreement with Sexton, before any settlement agreement was prepared. She stated repeatedly that she did not want the case to settle until after the mandamus was concluded and disagreed with Sexton's decision to do so. She did not at any time during the mediation state "her concern that any agreement which required continued confidentiality of safety information (or the release and return of safety related discovery) violated the Rules of Civil Procedure and therefore could not be a condition of settlement", not did she "admonish" Nelkin & Nelkin of her "concern".[13] (Appellants' Brief, p. 6). The Settlement Agreement signed at the mediation does not include any provision concerning return or confidentiality of documents. (Appellants' Response to Appellees' Motion to Dismiss Appeal, Exhibit "A"). Rather, it merely required the parties to keep confidential the terms of the Settlement Agreement, a provision to which Davenport as Sexton's counsel owned Sexton the duty to abide by."

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[12] Appellants' Brief states that Davenport prepared the petition and filed it "with attorneys from Nelkin & Nelkin". The Petition was actually prepared by Bain and forwarded to Davenport, for her input. After some additions and changes suggested by Davenport were included, Bain filed the Petition on January 22, 1992.

[13] Bain raised the issue of confidentiality in discussions with McGown at the time the final Settlement Agreement was signed late that evening because Sexton could not and would not agree to keep confidential the reasons for his discharge and the events that led up to his discharge for reasons in addition to Rule 76a.

APPENDIX B

No. 01-92-00028-CV

IN THE FIRST COURT OF APPEALS
Houston, Texas

JOHN R. SEXTON,

Relator

VS.

THE HONORABLE EUGENE CHAMBERS,
Judge of the 215th District Court,
Harris County, Texas,

Respondent

TEXACO, INC., TEXACO CHEMICAL CO.,
W.B. REALS and LOUIS GABRECHT, JR.,

Real Parties in Interest

AFFIDAVIT OF JOAN M. LUCCI BAIN

THE STATE OF TEXAS §

COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Joan M. Lucci Bain, who being by me first duly sworn upon her oath deposes and says the following:

1. "My name is Joan M. Lucci Bain. I am the attorney for John R. Sexton, Plaintiff in Cause No. 89-006630, in the 215th Judicial District Court of Harris

County, Texas, and Relator in Cause No. 01-92-00028-CV, a mandamus proceeding pending in the Court of Appeals for the First Supreme Judicial District of Texas.

2. I am lead counsel for John R. Sexton in both the trial and appellate court action listed above. In January 1990, Ms. Valorie Davenport was retained as a consultant, primarily for court appearances. During the course of the litigation, Ms. Davenport only drafted one motion, a Supplemental Motion to Compel Discovery filed in January 1990. All of the remaining pleadings were drafted by me, and some but not all were forwarded to Ms. Davenport to review prior to hearings.

3. The Petition for Mandamus which is pending in this Court was prepared jointly by myself and Ms. Davenport, I prepared the initial and second drafts, which were forwarded to her. She and I both made revisions to that draft before the final Petition was filed.

4. "I have reviewed the affidavits of Glen E. Clover attached to Texaco's Motion to Strike, or in the Alternative to Deny Relator's Supplemental Motion to Dismiss and the Affidavit of Valorie Davenport attached to her Response to Defendants' Motion to Strike Supplemental Motion to Dismiss filed March 5, 1992._____.

5. "Mr. Clover states that I told him I had not authorized Ms. Davenport to file Relator's Supplemental Motion to Dismiss, that I had not reviewed the supplemental motion before it was filed, and that to the best of my knowledge Mr. Sexton had

also not read the supplemental motion or authorized its filing on his behalf. I believe this characterization of our conversation is incomplete and inaccurately characterizes some of the statements I made.

6. "I did tell Mr. Clover during our February 23, 1992 conversation that I was unaware that the supplemental motion had been filed until after it had been filed This a true statement.

7. "I also discussed several other matters with Mr. Clover, including the fact that, based upon my review of Rule 76A, I did not feel the settlement agreement reached in this action violates that rule, primarily on the basis that the documents that are in my possession reflecting conditions at Texaco facilities were supplied to me by Mr. Sexton, not Texaco. (The settlement agreement called for return of documents provided by Texaco in the action). The only documents first produced by Texaco which reflect those conditions have been filed with the trial court as exhibits to pleadings. These are, therefore, part of the public record.

8. "The 21 documents which are the subject of the mandamus proceeding and the primary focus of Ms. Davenport's supplemental motion have never been in my possession. Thus, it is my understanding that the only documents which may reflect conditions that are dangerous to the public which are not a part of the trial and appellate court records are the 21 documents which are the subject of the mandamus proceeding.

9. "During our conversation on Friday, February 21, 1992, I informed Mr. Clover that in my opinion the provision in the agreement requiring that the

documents be returned and the information kept confidential "unless otherwise required by law" would govern, so that no violation of Rule 76A was possible..

10. "Mr. Clover acknowledged that he and Mr. Mitchell had received Ms. Davenport's February 10, 1992, letter expressing her concern before the final documents were signed, and had not responded. I told him that I did not receive a copy of that letter.

11. "During my conversation with Mr. Clover, it was obvious he had just learned of the filing of the Supplemental Motion to Dismiss. He indicated that he felt that Texaco would probably seek sanctions against Ms. Davenport for her filing. I informed him at that time that felt that motion for sanctions would be inappropriate since I truly believed that Ms. Davenport had filed the supplement in good faith effort to determine her ethical responsibilities. This firm, Mr. Sexton, and I all stand ready to abide by any ruling the First Court of Appeals may make. Neither we nor Mr. Sexton ever intended to violate any provision of Rule 76A by agreeing to return to Texas the documents Texaco had produced during the proceedings.

12. "To address Ms. Davenport's affidavit, I raised the problem of a blanket "confidentiality agreement' at the mediation and in the context of the proposed final settlement agreement. In fact, I forwarded a copy of that agreement to Ms. Davenport. Ms. Davenport did not send me a copy of her February 10,1992 letter to Messrs. Clover and Mitchell or even tell me she had sent it. I did not speak to her again until after the settlement agreement had been signed, and motions to

dismiss had been filed in both the trial and appellate courts, although I had left several messages at her office which were not returned.

13. On February 18 or 19, 1992, I spoke with Ms.Davenport to let her know that all final documents had been exchanged and filed. At that time she told me of her February 10,1992 letter. I explained to her that neither Mr. Clover nor Mr. Mitchell brought the letter to my attention, and we began to discuss her concern that the settlement agreement might violate Rule 76A,Tex. R. Civ. Pro. I explained to her that I did not think that the agreement violated the rule for several reasons. First, the majority of the documents which I have in my possession which reflect the conditions about which Mr. Sexton complained prior to his discharge in November 1987 were not documents produced by Texaco, therefore, they are not the subject of the confidentiality provision of the settlement agreement. That agreement only requires return of documents produced by Texaco. Further, I explained that the few (less than five) documents produced by Texaco dealing with safety issues had already been filed with the trial court and this Court as exhibits to various motions or responses to motions which I filed on Mr. Sexton's behalf. Texaco did not file, nor did I agree to, any motion to seal the court's record. Therefore, these few documents which I agree to return to Texaco are, and will remain public record. Thirdly, the 21 documents which are the subject of this mandamus proceeding are not in my possession or the possession of my client. We did not agree to return those documents or to keep their contents confidential, since we never had them. Finally the provision in the agreement regarding keeping information confidential is also limited to

documents produced by Texaco, and further allows Mr. Sexton to disclose that information if required to do so by law. Several of Mr. Sexton's affidavits and the affidavit of an expert, Mattson, are already on file with the Court explaining the information contained in these documents.

14. Paragraph 5 of Ms. Davenport's affidavit fails to distinguish between these three different categories of documents. Rather, it implies I obtained "copies" of documents I agreed to return from "another source". This is simply not the case. Neither Mr. Sexton nor I agreed to return any documents obtained from other sources. Furthermore, it is the documents from other sources which primarily reflect the safety hazards which were the subject of Mr. Sexton's case. Perhaps Ms. Davenport's misconception arises from her lack of familiarity with the source of the documents she has seen, since I have handled all of the document productions.

15. I also feel that is important to point out that due to Judge Chamber's discovery orders, I was unable to conduct any discovery to determine the status of the conditions which caused Mr. Sexton concern for any period after November 13, 1987. This was another subject of the mandamus proceeding. I, therefore, have no current information from any source regarding any present conditions.

16 "Ms. Davenport did inform me on February 19, 1992, that she was considering filing a supplement to the Motion to Dismiss. She agreed to send me a copy for my review and consideration before it was filed. On Wednesday afternoon, February 19, 1992, she had a draft copy of the proposed motion hand-delivered to

my office; however, the delivery was first reviewed by a partner in the firm and I left for an afternoon meeting unaware that it had been received. Ms. Davenport did not tell me during our conversation that morning that she intended to file the motion that afternoon. On February 20th, I was served with a copy of the motion which had been filed the day before. I did not discuss these conversations with Mr. Clover, although I did tell him I believed Ms. Davenport felt strongly that filing the motion was appropriate, and I did not believe that she would voluntarily withdraw the motion.

17. "After my conversation with Mr. Clover, I was informed by Ms. Davenport that the Court Clerk informed her that if any additional motion was to be considered, it had to be filed as soon as possible. She also stated that any extended delay could result in the Court's acting on the pending Motion to Dismiss without knowledge of the Rule 76A question. Ms. Davenport stated that when she heard nothing from my office in response to hand delivery on February 20, 1992, she decided to file the motion with the Court of Appeals immediately before the close of business Thursday afternoon.

Further Affiant sayeth not.

/s/ Joan M. Lucci Bain
JOAN M. LUCCI BAIN

SUBSCRIBED AND SWORN TO before me by Joan M. Lucci Bain on this 6 day of March, 1992.

/s/ Mary Ruth Kegarise
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

NELKIN & NELKIN
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TELEPHONE (713)526-4500 | 5417 CHAUCER P.O. BOX 253103 HOUSTON, TEXAS 77265 | TELECOPIER (713)526-8915

May 8, 1992

The Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

Re: Cause No. 01-92-0028-CV;*John R. Sexton v. The Honorable Eugene Chambers*

TO THE HONORABLE JUSTICES OF THE FIRST COURT OF APPEALS;

This letter is Relator's response to the April 2, 1992 and April 30, 1992 letters to the Court of Valorie W. Davenport, and to the April 27, 1992 letter to the Court submitted by Glen E. Clover on behalf of the Real Parties of Interest. This letter will also serve to advise the Court that Ms. Davenport has no further authority to represent Relator, and that the undersigned is the sole remaining counsel with authority to act on behalf of Relator John R. Sexton in this matter. All of the filings in this proceeding subsequent to the filing of the original Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus should be considered filing by Ms. Davenport on her own behalf, <u>not</u> as filings on behalf of Relator.

Relator's counsel was not served with a copy of either the April 2, 1992 or April 30, 1992 filing by Ms. Davenport. It was not until April 29, 1992 that Relator became aware of

the April 2nd letter, when Relator's counsel received the response of the Real Parties in Interest. Relator's counsel finally obtained a copy of the April 2nd letter on May 4, 1992. In the future, should this Court receive any filings that do not reflect that counsel for Relator has been properly served in accordance with the Texas Rules, Relator respectfully requests that those filings be stricken from the record.

RELATOR'S RESPONSE TO APRIL 2, 1992 DAVENPORT LETTER.

In paragraph 2 of her April 2, 1992 letter, Davenport states that the settlement agreement entered into between Relator and the Defendants in the underlying action requires a "purging" of the files of Relator's counsel, including "material produced by Texaco which may have a probable adverse effect upon the public health and safety." This statement, ignores the detailed explanation provided in the undersigned's affidavit of March 6, 1992 which specifies that the documents to be returned to Texaco do not include documents which reflect conditions which may have probable adverse effect on the public because those documents were either (a) obtained from other sources; or (b) attached to pleadings. These are also attached to depositions. The settlement agreement does not require Relator or his counsel to return pleadings or depositions to Texaco. Those documents will be retained in accordance with the usual retention policy of Nelkin & Nelkin. Thus, neither Relator nor his counsel, entered into an agreement to "purge" their files, or to obstruct access to those documents which reflect conditions which may have a probable adverse effect on public health and safety. To the contrary, it is largely due to Relator's efforts in the underlying lawsuit that those records are now available to the public. The settlement agreement, and the March 6th affidavit of Relator's counsel is clear, that

any information obtained from other sources will not be returned to Texaco. In fact, the documents being returned to Texaco are documents such as personnel files, Texaco employment policies and manuals, business plans, and similar documents which simply have no impact on the public health and safety. Further, the settlement agreement provides that if required by law to disclose the contents of any material returned, Relator will do so. Those few documents produced by Texaco which in fact reflect safety inspections will be maintained both as a part of the Court's record, and the pleading files and depositions retained by the undersigned. Even Ms. Davenport must concede that there is no requirement in Rule 76A that unfiled discovery which does not have any impact on the public health and safety be maintained by counsel and made available for public inspection.

As stated in the March 6, 1992 affidavit of Relator's counsel the twenty-one (21) documents which were produced in camera, are not, and never have been in the possession of Relator's counsel, or of Relator since his termination from Texaco in 1987. It is Relator's position that these documents are not the subject of the confidentiality provision contained in the settlement agreement. None of the twenty-one (21) documents at issue reflect current conditions that exist at Texaco facilities. In fact, a primary issue raised by Relator in the mandamus proceeding was Respondent's failure to allow Relator to discover the current conditions a the Texaco Chemical facilities. Although Ms. Davenport focuses on the conditions at the Austin Research Laboratory, there were three other Texaco Chemical Company facilities involved. These twenty-one (21) documents were critical to the allegations of Relator's case in that they reflected Relator's personal efforts to remedy the conditions which are identified in those reports, demonstrating not only the severity of the

conditions that existed at the time, but also Texaco's motivation for terminating him.

The question of whether documents filed in camera constitute "unfiled discovery" within the meaning of Rule 76A is a novel issue which must be determined by this Court. Relator and his counsel resent the continued unfounded accusations by Ms. Davenport that Relator or his counsel entered into a confidentiality agreement relating to the twenty-one (21) documents which have been filed for in camera inspection, since that agreement does not even mention those documents. This Court's determination with regard to the disposition of those documents will be instructive to Relator, Respondent, and all counsel and parties involved. Should this Court determine that a custodian is necessary for these documents, the undersigned would be more than willing to include those documents within her permanent file retained in accordance with this firm's file retention policy. The undersigned counsel has done nothing "to assist Texaco's destruction of the twenty-one (21) documents filed in-camera. Furthermore, Relator's pleadings and affidavits concerning the contents of those documents, contain nothing to suggest that Relator ever contended that those documents reflect current conditions that exist at the Austin lab or any other facility. To the contrary, it was Relator's position that additional discovery was necessary to determine what current conditions exist. This never occurred.

Finally, with regard to Ms. Davenport's "authority" to file the Supplemental Motion to Dismiss, as Relator's counsel explained in her affidavit of March 6, 1992, Ms. Davenport filed the supplemental motion without the knowledge of Relator or his counsel. It has always been the undersigned's position that Ms. Davenport has the right to seek instruction from this Court on her own behalf regarding her own ethical responsibilities as an attorney relating to

Rule 76a. She dose not, however have the right to make statements purportedly on behalf of Relator which do not accurately characterize his prior testimony or the settlement agreement. There are several inaccurate statements contained in Ms. Davenport's Supplemental Motion to Dismiss which she attributes to Relator. Unfortunately these statements and others that were not made during the hearing of March 9, 1992, were reported in the Houston Press article submitted with the April 27, 1992 letter of Glen E. Clover. Thus, Ms. Davenport's failure to heed her responsibility to insure that her pleadings are factually accurate has proved damaging to her former client.

In spite of the foregoing, Relator and his counsel urge this Court to set aside the petty arguments among counsel regarding the other's motivations and/or actions, and responsibilities, and turn its attention to the more important issue before it, specifically the proper disposition of the twenty-one (21) documents currently being held by Respondent. Should this Court also determine that Rule 76a is applicable to the confidentiality provision of the settlement agreement, Relator and his counsel will respectfully abide by this Court's ruling.

RESPONSE TO THE APRIL 27, 1992 REPLY OF TEXACO, ET AL.

In his April 27, 1992 Reply to the letter of Ms. Davenport, Glen E. Clover, counsel for the Real Parties in Interest refers to a short excerpt from some "deposition" testimony of John R. Sexton, Relator, in an unrelated case. This excerpt, which is from a deposition not in the possession of the undersigned, is not properly authenticated, or before this Court. Nonetheless, because Mr. Clover's letter insinuates that there are inconsistencies between that testimony and the allegations of Relator in this case, Relator

feels compelled to respond. As reflected in the attached affidavits of Relator which have previously been submitted in this cause, Relator served as Manager of Texaco' corporate Safety Department for a decade. During that entire period he received outstanding performance appraisals. It always has been the position of Relator that while he was in charge of Texaco's corporate safety department, he emphasized the importance of safety related issues. As a result of the programs he implemented, in 1986, Texaco enjoyed its best safety record ever. In fact, Relator's testimony in this action has consistently been that prior to 1986, he received the cooperation of most Texaco departments, but that he encountered resistance from Texaco Chemical Company when he instituted a program of hazard assessments and safety reviews at that subsidiary's facilities. Relator has also testified that Texaco Chemical Company was the only department that was reluctant to comply with the safety programs he had implemented as Manager of Corporate Safety. Thus, Relator's "testimony" in Mr. Clover's letter that "prior to 1987 Texaco had a good safety program and a good safety record" is fully consistent with Relator's testimony in this action. Mr. Clover's insinuation that Relator has in any way contradicted his testimony in this action is simply not true.

RESPONSE TO APRIL 30, 1992 LETTER OF VALORIE DAVENPORT

In the last paragraph of her April 30, 1992 letter Ms. Davenport attempts to address the deposition excerpt referred to in the April 27th letter from Mr. Clover. Relator expressly rejects Ms. Davenport's characterization, or rationalization which is based upon her speculation. In fact, as explained above, that testimony, assuming it to be an accurate transcription, is fully consistent with Relator's testimony in this action.

In summary, neither Relator, nor his counsel have agreed to return or keep confidential the contents of any documents which are currently on file with any court as part of the pleadings in this case. The twenty-one (21) documents which were submitted to the 215th Court for an in camera inspection, are also not contemplated by the settlement agreement. Their contents do reflect hazardous conditions that existed at Texaco and Texaco Chemical Company facilities as of the time those documents were prepared. Relator and his counsel stand ready to abide by this Court's ruling with regard to the disposition of any of the documents obtained through discovery in this case. Relator has no information regarding current conditions at any Texaco facilities since that information was withheld from him under the Respondent's discovery orders.

Respectfully submitted

s/ Joan M Lucci Bain
Joan M. Lucci Bain
Counsel for Relator

JMLB/kib
Enclosures

cc w/Enclosures: Ms. Valorie Davenport
4300 Scotland
Houston, Texas 77007

Mr. J. Mart Mitchell
Texaco, Inc.
Box 52332
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Mr. Glen E. Clover
Sugar Creek National Bank Building
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One Sugar Creek Center Blvd.
Sugar Land, Texas 77478

Mr. John Sexton
2334 Lake Village Drive
Kingwood, Texas 77339

APPENDIX C

VALORIE W. DAVENPORT
1106 Louisiana, Suit 4450 • Houston, Texas 77002
Phone: 713-655-1500 • Facsimile: 713-655-0077

Valorie W. Davenport
Attorney at Law

May 24, 1993

Ms. Joanie Bain
Nelkin & Nelkin
5417 Chaucer
Houston, Texas 77005

Re: No: 89-006630; John R. Sexton vs. Texaco, Inc, et al.

Dear Ms. Bain:

I request that you provide copies of John Sexton's deposition (all volumes), all of John's personnel and medical records generated while he was employed at Texaco, and any and all medical records obtained and/or produced in his case. I also need copies of all request for production answers and interrogatory answers which John provided to Texaco during the course of the litigation. Should there be anything else in the file which in any way reflects John's medical condition or supported John's medical claims, I also request a copy of that material as well.

I ask that this material be copied and/or made available immediately. It would certainly expedite the situation if this material could just simply be copied and sent over; however, I am willing to come over and inspect the material and make arrangements for it to be

reproduced if this will help ensure that the records are ready as soon as possible.
Thank you for your cooperation.

Sincerely

s/ Valorie W. Davenport

Valorie W. Davenport

VALORIE W. DAVENPORT
1100 Louisiana, Suite 4450 • Houston, Texas 77002
Phone: 713-655-1500 • Facsimile: 713-655-0077

Valorie W. Davenport
Attorney at Law

June 2, 1993

Joan M Lucci Bain
Nelkin & Nelkin
5417 Chaucer
Houston, Texas 77005

Dear Ms. Bain:

As you know, 76a entitles any person access to unfiled discovery not subject to a proper sealing order. Therefore, please advise me of your preference as to the mechanics of how the requested material can be copied, and I will make the necessary arrangements immediately, at my expense, of course.

I would appreciate your full and expedited cooperation.

Very truly yours,

s/ Valorie W. Davenport
Valorie W. Davenport